IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31/12/2002

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THE HONOURABLE MR.JUSTICE N.V.BALASUBRAMANIAN
and
THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

T.C.No.212 of 1999

M/s.Jai Bharath Tanners,
Vellore. ... Applicant

-Vs-

The Commissioner of Income-tax,
Tamil Nadu V, Madras. .. Respondent

Reference arising out of the order of the Income-tax Appellate Tribunal, B-Bench, Madras in I.T.A.No. 4101 Mds/89, dated 24.7.1996, at the instance of the assessee.

!For applicant :: Mr.V.S.Jayakumar

^For respondent :: Mrs.Pushya Sitharaman, Sr.SC for IT.

:JUDGMENT

N.V.BALASUBRAMANIAN,J.

This is a reference at the instance of the assessee. The assessee requested the Income-tax Appellate Tribunal to state a case and refer the following questions of law:
1. Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the order passed by the CIT U/s.263 of the I.T.Act is valid?

2. Whether on the facts and in the circumstances of the case the Tribunal was right in holding that the CIT could validly invoke the provision of section263 of the Act, even though the same does not accord to the instructions given by the Central Board of Direct Taxes in similar situations?

2. The Appellate Tribunal, by order dated 24.12.1998, has stated a case and referred only the first question stated above. The Appellate Tribunal rejected the second question on the ground that it was only argumentative in nature and not fit for reference and that the assessee did not produce the Board's instructions before the Tribunal. The assessee,

aggrieved by the order of refusal to refer the second question, approached this Court by a writ petition in W.P.No.12910 of 1 997 and E.Padmanabhan,J., who heard the writ petition, taking note of the submission of the learned counsel for the assessee and the Revenue, held that it is open to the assessee to challenge the order passed by the Appellate Tribunal and also to rely upon the Board's circular at the time of final hearing of the reference. Learned counsel for the assessee submitted that though this Court has permitted the counsel for the assessee to urge his submissions on the second question, he is not urging any point on the second question. Hence, it is not necessary to consider the same.

3. The relevant facts as seen from the statement of case are that the assessee firm was engaged in the business of purchase and sale of tanned and finished hides and the assessee earned some portion of turnover from and out of the export activities carried on by the assessee. The assessee for the assessment year 1986-87 filed a return of income disclosing a total income of Rs.10,32,500/- and admitted in Part/III of the return firstly, the premium on sale of import entitlements of Rs.68,900/- and secondly, cash compensatory support of Rs.8,59 ,373/-. The assessee also claimed deduction under section 80HHC of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') of Rs.4,58,356/- and a sum of Rs.6,04,780/- under section 80 HH of the Act. The assessee claimed in its return that the amounts representing the premium on sale of import entitlements and the amount received towards cash compensatory support were liable to be exempt.

4. The assessing officer accepted the return filed by the assessee and completed the assessment under section 143(1) of the Act by order dated 29.3.1989. The Commissioner of Income-tax (hereinafter referred to as 'the Commissioner') invoked his revisional jurisdiction under section 263 of the Act and revised the assessment made by the assessing officer under section 143(1) of the Act. The Commissioner held that as far as subsidy and the import entitlements are concerned, they are the normal trade receipts of the assessee and there are number of decisions of this Court to support the view that the premium on sale of import entitlements received by an exporter arises in the course of business and is taxable as business income. He also held that the cash compensatory support amount is also business income. As far as the deductions under sections 80HH and 80 HHC are concerned, the Commissioner held that it is for the assessee to prove that the conditions laid down in both the sections have been fulfilled and without being satisfied that the conditions have been complied with, the deduction under section 80HH and 80 HHC cannot be granted automatically. He therefore held that the assessing officer completed the assessment under section 143(1) of the Act even without looking into the question of eligibility of the deduction or the liability of receipt to tax and the assessment made is erroneous and prejudicial to the interests of Revenue. After hearing the counsel for the assessee, the Commissioner held that there were obvious mistakes in the order of assessment and set aside the order of assessment and restored the same to the assessing officer to enable him to look into the claims of the assessee and decide them in accordance with law.

5. Aggrieved by the order passed by the Commissioner, the assessee preferred an appeal before the Appellate Tribunal. The Appellate Tribunal held that it is the duty of the assessing officer to verify whether the conditions for allowing deduction under sections 80 HH and 80 HHC of the

Act have been satisfied, and if it is allowable, how much is allowable. The Appellate Tribunal relied upon the decision of this Court in INDIAN TEXTILES v. C.I.T. (157 ITR 112) and held that the relief was given by the assessing officer without proper verification and the order of the assessing officer was an order prejudicial to the interests of the Revenue which could properly form the subject matter of revision. The Appellate Tribunal therefore held that the Commissioner was justified in setting aside the assessment order and restored the same to the assessing officer enabling him to look into the claims of the assessee and decide them in accordance with law.

6. As earlier observed, the assessee sought for reference and the first question sought for by the assessee has been referred to for consideration.

7. Mr.V.S.Jayakumar, learned counsel for the assessee submitted that the order of the Commissioner merely directed the assessing officer to look into the claims of the assessee and decide the same in accordance with law. He further submitted that the Commissioner has not even formed a prima facie opinion that the deductions granted by the assessing officer were erroneous. He also submitted that under section 143(1) of the Act, it is not necessary for the assessing officer to conduct a detailed enquiry and section 143(1) of the Act does not contemplate that enquiry should be conducted before accepting the return filed by the assessee and to make an assessment under that section. He further submitted that the Commissioner was not correct in holding that the assessing officer should conduct an enquiry in the proceedings initiated and concluded under section 143(1) of the Act and the decisions on which the Appellate Tribunal placed reliance are all cases dealing with the assessments made under section 143(3) of the Act where the assessing officer has to conduct a thorough enquiry and then pass an order of assessment under section 143(3) of the Act, and when the assessing officer did not conduct the enquiry, the Courts have taken the view that the order of assessment passed without enquiry under section 143(3) of the Act would be erroneous and prejudicial to the interests of the Revenue. He therefore submitted that the decisions delineating the powers of the Commissioner with reference to the order passed under 143(3) of the Act are not applicable in the exercise of power of revision over an order of assessment made under section 143(1) of the Act. He therefore submitted that the Commissioner had no material at all to set aside the order of assessment passed by the assessing officer.

8. Mrs.Pushya Sitharaman, learned senior standing counsel for the Revenue, on the other hand, submitted that the nature of the order passed by the assessing officer clearly shows that the assessing officer should not have passed the order under section 143(1) of the Act and the Commissioner was right in holding that without verification, the deduction ought not to have been granted and the power under section 143(1) of the Act should not have been resorted to by the assessing officer in completing the assessment. She therefore submitted that the Commissioner had necessary jurisdiction to invoke his powers under section 263 of the Act.

9. We have carefully considered the submissions of the learned counsel for the assessee and the learned senior standing counsel for the Revenue. The Commissioner, as seen from the facts detailed earlier, has set aside the order of assessment passed by the assessing officer under section 143(1) of the Act. The Commissioner has considered two aspects of the

matter which were subject matter of summary assessment under section 143(1) of the Act. In so far as the subsidy and the import entitlements are concerned, he has stated that there are number of decisions of this Court holding that the premium on sale of import entitlements received by the exporter is an income from business. Sub-sections (iiia), (iiib) and (iiic) of section 28 of the Act postulate that the profits on the sale of an import licence, cash assistance and duty of customs or excise repaid or repayable as drawback are all treated as business income and by the Finance Act, 1990, section 28 has been amended with full retrospective effect from 1.4.1961 treating all kinds of income covered under three sub-sections as business income of the assessee. The effect of substitution of the amended section with retrospective effect is that the order of the assessing officer under section1 143(1) holding that the receipts in question were capital receipts and not taxable under the provisions of the Income-tax Act is plainly erroneous. That apart, this Court in C.I. T. v. WHEEL & RIM CO. OF INDIA LTD. (107 ITR 168), by judgment dated 7 .9.1976, held that the receipts received by cash subsidy and import entitlements are profits and gains derived by the assessee in the export of goods and they are business income. This Court in another decision in GEORGE MAIJO & CO. (VIZAG) v. C.I.T. (157 ITR 475), by judgment dated 14.3.1985, held that the sale of import entitlements received on export would constitute a revenue receipt and not a capital receipt. As already observed, the assessing officer has made the order of assessment under section 143(1) of the Act on 29.3.1989 and when he made the assessment under section 143 (1) of the Act, two decisions of this Court were holding the field and the order passed by the assessing officer overlooking the binding decisions of this Court is plainly erroneous. Though the Commissioner in his order has not given the citation of the cases decided by this Court, yet, when he referred in his order that 'there are a number of decisions from the Madras High Court', he must have meant not only these two decisions earlier referred to, but also other decisions of this Court taking the same view on this subject. We therefore hold that the Commissioner was justified in invoking his power of revision under section 263 of the Act as regards the taxability of receipts by import entitlements and also from cash compensatory support as business income.

10. The main submission of Mr.Jayakumar, learned counsel for the assessee is that so far as sections 80 HH and 80 HHC of the Are are concerned, there are no materials for the Commissioner to hold that the deduction granted was erroneous. He submitted that it is not open to the Commissioner to direct the assessing officer to look into the question of eligibility and the power of revision cannot be exercised for directing the assessing officer to look into the matter afresh and decide the matter. We are unable to accept the submission of the learned counsel for the assessee. Section 143(1)(a) of the Act was inserted by the Taxation Laws (Amendment) Act, 1970 with effect from 1.4 .1971 and the Section which was inserted, reads as under:-

" S.143.Assessment - (1)(a) Where a return has been made under section 139, the Assessing Officer may, without requiring the presence of the assessee or the production by him of any evidence in support of the return, make an assessment of the total income or loss of the assessee after making such adjustments to the income or loss declared in the return as are required to be made under clause (b), with reference to the return and the accounts and

documents, if any, accompanying it, and for the purposes of the adjustments referred to in subclause (iv) of clause (b), also with reference to the record of the assessments, if any, of past years, and determine the sum payable by the assessee or refundable to him on the basis of such assessment.
(b) In making an assessment of the total income or loss of the assessee under clause (a), the Assessing Officer shall make the following adjustments to the income or loss declared in the return, that is to say, he shall -
(i) rectify any arithmetical errors in the return, accounts and documents referred to in clause (a);
(ii) allow any deduction, allowance or relief which, on the basis of the information available in such return, accounts and documents, is prima facie, admissible, but is not claimed in the return;
(iii) disallow any deduction, allowance or relief claimed in the return which, on the basis of the information available in such return, accounts and documents, is, prima facie, inadmissible.
(iv) give due effect to the allowance referred to in sub-section (2) of section 32, the deduction referred to in clause (ii) of subsection (3) of section 32A or clause (ii) of sub-section 92) of section 3 3 or clause (ii) of sub-section (2) of section 33A or clause (i) of sub-section (2) of section 35 or sub-section (1) of section 35A or sub-section (1) of section 35D or sub-section (1) of section 35E or the first proviso to clause (ix) of sub-section (1) of section 36, any loss carried forward under sub-section (1) of section 72 or subsection (2) of section 73 or sub-section (1) or sub-section (3) of section 7 4 or sub-section (3) of section 74A and the deficiency referred to in sub-section (3) of section 80J, as computed, in each case, in the regular assessment, if any, for the earlier assessment year or years."
Sub-clauses (ii) and (iii) of section 143(1)(b) were omitted by the Finance (No.2) Act, 1980 and the reason for the deletion is stated in the statement of objects and reasons and it reads as under:-
" Under section 143(1) of the Income-tax Act, an Income-tax Officer may make a regular assessment without requiring the presence of the assessee or the production by him of any evidence in support of the return, and without being satisfied that the return was correct and complete in all respects. In making such a 'summary assessment', the Income-tax Officer has the authority to make certain adjustments to the income or loss declared in the return. These adjustments are by way of -
(i) rectifying any arithmetical error in the return, accounts and documents, if any, accompanying it;
(ii) allowing any deduction, allowance or relief which, on the basis of information available in such return, accounts and documents is, prima facie, admissible though not claimed in the return;
(iii) disallowing any deduction, allowance or relief claimed in the return which, on the basis of the information available in such return, accounts and documents, is prima facie, inadmissible; and
(iv) giving due effect to the deductions and allowances brought forward from earlier years, namely, unabsorbed depreciation (section 32(2); unabsorbed investment allowance (section 32A(3)(ii); unabsorbed development rebate (section 33(2)(ii); unabsorbed development allowance (section33A(2)(ii); unabsorbed amount of capital expenditure incurred on

scientific research (section 35(2)(i); capital expenditure on acquisition of patent rights and copyrights (section 35A(1); unabsorbed amount of certain preliminary expenses which are amortisable against profits (section 35D(1); expenditure on prospecting for or development of specified minerals amortisable against profits (section 35E(1); capital expenditure on family planning incurred by an Indian company (section 36(1)(ix), 1st proviso); unabsorbed losses brought forward from earlier years which are admissible as set off (sections 72(1), 73(2), 74(1) and 74(3); and the deficiency in tax holiday profits which is eligible for set off (section 80J(3).

The adjustments to be made in the summary assessment in regard to items specified in (iv) above are to be based on the computation made in the regular assessment, if any, for the earlier assessment year or years."

11. It is clear that an assessment under section 143(1)(a) of the Act is a summary assessment and in making summary assessment, the assessing officer is required to make assessment of the total income with reference to the return without requiring the presence of the assessee to produce any evidence in support of the return. The summary exercise of power to make assessment under section 143(1)(a) of the Act does not contemplate any enquiry as required in the case of regular assessment and an order of summary assessment is required to be made only in cases where there are no disputed questions of fact or law involved. In other words, where there are disputed questions of facts or law in making the assessment, the assessing officer may not resort to the summary assessment. We are of the opinion that the deductions contemplated under sections 80 HH and 80 HHC of the Act involve a detailed enquiry as to the factual aspects of the matter and the satisfaction of the assessing officer of various conditions prescribed in sections 80 HH and 80 HHC of the Act for claiming deduction. It is axiomatic that before granting deduction, the assessee must establish that the assessee is entitled to the statutory deduction under sections 80 HH and 80 HHC of the Act by producing necessary materials in support of its claim and the assessing officer should also be satisfied that the conditions prescribed in both the sections are complied with by the assessee. In other words, only after a detailed enquiry and the satisfaction of the assessing officer that the requirements of sections 80 HH and 80 HHC are complied with, the assessee would be entitled for the grant of deduction. In other words, the deduction under sections 80 HH and 80 HHC cannot be granted automatically, nor can it be disallowed automatically. The assessing officer, either for granting or disallowing the deduction should be satisfied after due enquiry that the assessee is eligible or not eligible for deduction. We are of the view that the order of the assessing officer granting deduction without an enquiry is plainly erroneous and prejudicial to the interests of the Revenue.
12. Learned counsel for the assessee referred to number of cases and we are of the view that it is not necessary to consider all the decisions as the decision of the Supreme Court in MALABAR INDUSTRIAL CO. LTD. v. C.I.T. (243 ITR 83) would govern the facts of the case. The Supreme Court in Malabar Industrial Co. case considered the jurisdiction of the Commissioner under section 263 of the Act. The Supreme Court, while considering the question whether the order of the assessing officer is erroneous and prejudicial to the interests of the Revenue, considered the

phrase, 'prejudicial to the interests of the Revenue' and held that the phrase, 'prejudicial to the interests of the Revenue' should be read in conjunction with an erroneous order passed by the assessing officer. The Supreme Court noticed the earlier decisions in Rampyari Devi Saraogi v. C.I.T. (67 ITR 84) and Dara Devi Aggarwal (Smt.) v. C.I.T. (88 ITR 323) wherein the Supreme Court held that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the assessing officer accepting the same as such will be erroneous and prejudicial to the interests of the Revenue. The Supreme Court in Malabar Industrial Co. Ltd. case laid down the law as under:-

"... the Commissioner noted that the Income-tax Officer passed the order of nil assessment without application of mind. Indeed, the High Court recorded the finding that the Income-tax Officer failed to apply his mind to the case in all perspective and the order passed by him was erroneous. It appears that the resolution passed by the board of the appellant-company was not placed before the assessing officer. Thus, there was no material to support the claim of the appellant that the said amount represented compensation for loss of agricultural income. He accepted the entry in the statement of the account filed by the appellant in the absence of any supporting material and without making any inquiry. On these facts the conclusion that the order of the Income-tax Officer was erroneous and irresistible."

We are of the view that the ratio laid down by the Supreme Court would squarely apply to the facts of the case.

13. This Court in INDIAN TEXTILES v. C.I.T. (157 ITR 112) was considering a case where the relief under section 35B of the Act was granted without verification whether the conditions prescribed under section 35B were satisfied. This Court held that the order granting the relief was an erroneous order which would be prejudicial to the interests of the Revenue. This Court held as under:-

" As already stated, in this case, the Income-tax Officer gave relief to the assessee in respect of certain matters which, according to the Commissioner is not justified. Once that finding is reached by the Commissioner, the revisional jurisdiction under section 263 of the Income-tax Act could be validly invoked by the Commissioner as part of the order passed by the Income-tax Officer is in his opinion prejudicial to the assessee. In this case, without any proper verification, the Income-tax Officer has given relief, and that such an order being an order prejudicial to the Revenue, it could properly form the subject matter of the revision under section 263 of the Income-tax Act by the Commissioner. The mere fact that subsequently the Tribunal modifies the order of the Commissioner as one remitting the matter to the Income-tax Officer will not mean that the Commissioner has no jurisdiction to deal with the matter earlier under section 263 of the Income-tax Act. We are, therefore, in entire agreement with the view of the Tribunal that the Commissioner had jurisdiction to deal with the matter under section 263 of the Income-tax Act."

14. A similar view was taken by this Court in K.A.RAMASWAMY CHETTIAR v. C.I.T. (220 ITR 657) wherein this Court held as under:-

"... the Income-tax Officer is expected to make an enquiry before taxing the particular item of income or before granting deduction of a

particular item of expenditure and if he does not make such an enquiry as expected, that would be a ground for the Commissioner of Income-tax to interfere under section 263 of the Act."

15. This Court in C.I.T. v. SESHASAYEE PAPER AND BOARDS LTD. (242 ITR 490) (in which one of us was a party), held that the powers of the Commissioner are very wide in exercising the revisional jurisdiction under section 263 of the Act. This Court has held as under:-

" The Commissioner is empowered to pass an order as the circumstances of the case may warrant. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct a fresh assessment. The Commissioner is fully empowered to adopt any one of the three courses indicated by the provisions of section 263 of the Act and the Commissioner's power cannot be faulted because he cancelled the assessment and directed a fresh assessment. There is nothing in section 263 of the Act to show that the Commissioner of Income-tax should in all cases record his final conclusion on the points in controversy before him. It would all depend upon the facts of each case to decide whether the Commissioner had exercised the powers properly or not."

16. The same view was also taken by this Court in C.I.T. v. SOUTH INDIA SHIPPING CORPN. LTD. (233 ITR 546) and this Court held that it is enough for the Commissioner to come to the prima facie conclusion that the order of the Income-tax Officer is prejudicial to the interests of the Revenue and it is not necessary for him to come to a final conclusion of the matter.

17. Learned counsel for the assessee relied on the decision of the Bombay High Court in C.I.T. v. GABRIEL INDIA LTD. (203 ITR 108). The decision of the Bombay High Court, relied upon by the learned counsel for the assessee, was considered by this Court in C.I.T. v. SESHASAYEE PAPER AND BOARDS LTD. (242 ITR 490) and it was found that the case was distinguishable. Here also, the Commissioner found that the assessing officer has not conducted any enquiry before allowing the deduction which is not warranted under the provisions of the Act. As far as the decision of this Court in C.I.T. v. SAKTHI CHARITIES (244 ITR 226) is concerned, that has no application as in that case the Income-tax Officer followed a decision of the Supreme Court and held that the assessee was entitled to exemption and in such circumstance, this Court held that the revisional order passed by the Commissioner was not justified.

18. Learned counsel for the assessee placed strong reliance on the decision of this Court in C.I.T. v. SMT. D.VALLIAMMAL (230 ITR 695). It was a case of undisclosed income and the Income-tax Officer completed the assessment on the basis of accounts, but the Commissioner set aside the order passed by the Income-tax Officer on the ground that the verification of accounts was needed. That case turned out on the facts of its own case and not a case of statutory deduction without verification.

19. The decision of this Court in C.I.T. v. AMALGAMATIONS LTD. (238 ITR 963) is also not applicable. In that case, there was no material before the Commissioner to show that the rent paid was too low and the annual rent determined by the assessing officer was erroneous. This Court held that in the absence of any material on record, the exercise of revisional power by the Commissioner was not warranted.

20. Learned counsel for the assessee placed strong reliance on the decision of the Madhya Pradesh High Court in NARIR SINGH v. C.I.T. (252 ITR 820), particularly the following observations:-

" Section 147 indicates that the case pertaining to the period ranging between seven and ten years can be reopened. But there is a limit to it. It is not to be applied in the cases which appear to be ' flies' before huge evasion of tax and concealment of taxable income by using clever/deceptive tricks. In this context, the observations of the Supreme Court in the matter of Parashuram Pottery Works Co. Ltd. v. ITO (1977) 106 ITR 1, has to be kept in view. In that judgment, after discussing the other points which were involved, the Supreme Court pointed out its view in the following paragraph (page 10):

" It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage and the lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as the income-tax assessment orders are concerned, they cannot be reopened on the score of income escaping assessment under section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, this cannot be said in the present case.'

These observations are to be applied in true spirit by the parties which are well conversant with the law and remain in existence for their work of assessment of tax and fixing the liability of paying the tax. This scale is not to be applied to simple 'flies' and innocent taxpayers who may come under the purview of either being penalised or being pulled up for the errors of filing the returns mentioning the self-assessment in respect of the liability of paying the tax. There should be an honest error of calculating the liability of payment of tax. There may be an error of calculation or clerical error in quoting the income in the returns. Such cases need not be opened unless there are compelling grounds to do so. Leave aside the existing need to reopen such case. In the present case, Shri Nazir Singh quoted his income earned as income from dearness allowance and ad hoc dearness allowance. However, he claimed the deduction and exemption from the liability of paying the tax. There was no case of concealment of the income or evasion of tax. In Parashuram Pottery Works Co. Ltd. v. ITO (1977) 106 ITR 1(SC), the case was not permitted to be reopened after the lapse of time of four years."

We are of the view that the observations have no application to the facts of the case after the decision of the Supreme Court in Malabar Industries Co. Ltd. case (243 ITR 83).

21. We therefore hold that the Appellate Tribunal was correct

in holding that the Commissioner has exercised his jurisdiction on proper and valid grounds and he has exercised his jurisdiction properly when he found that the assessing officer had granted deduction under sections 80 HH and 80 HHC of the Act without verifying the same. We do not find any infirmity in the order of the Appellate Tribunal and accordingly, we answer the question of law referred to us in the affirmative, against the assessee and in favour of the Revenue. No costs.

Index: Yes
Website: Yes
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To

1. The Assistant Registrar,
Income-tax Appellate Tribunal,
Rajaji Bhavan, Besant Nagar,
Chennai 600 090 (five copies with records)

2. The Secretary,
Central Board of Direct Taxes, New Delhi (3 copies)

3. The Commissioner of Income-tax, Tamil Nadu V,
Madras.

4. The Commissioner of Income-tax (Appeals),
Coimbatore Range, Coimbatore.

5. The Income-tax Officer,
Ward I(5), Vellore.